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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

INLAND PAPERBOARD AND PACKAGING, INC. f/k/a INLAND CONTAINER CORP., Complainant,	)	
v.	)	No. 00-0385
COMMONWEALTH EDISION COMPANY, Respondent.	)	
Complaint as to Municipal Taxes and Franchise Costs improperly charged to the complainant in Leyden Township, Illinois.	)	

INLAND PAPERBOARD AND PACKAGING, INC.'S RESPONSE TO COMMONWEALTH EDISON COMPANY'S MOTION TO DISMISS

Now comes the Complainant, INLAND PAPERBOARD AND PACKAGING, INC. ("Inland"), by and through its attorneys, Williams, Montgomery & John Ltd., and hereby respectfully requests this Commission deny Commonwealth Edison Company's ("ComEd") Section 200.190 Motion to Dismiss Inland's Amended Complaint, and in support thereof states as follows:

FACTS

Inland operates a manufacturing facility located at 11600 W. Grand Avenue, Leyden Township. Inland is situated in an area, which has been unincorporated during all times referred to in this claim. Inland was a customer of ComEd from December 5, 1989 through October 30,

1997. Each of the billing statements rendered by ComEd to Inland during this time period and thereafter identified Inland's service address as "at 11600 W. Grand Avenue, Leyden Township". During this period, ComEd continuously charged and collected Village of Franklin Park Municipal Taxes and Franchise Costs against Inland. On October 30, 1997, ComEd unilaterally and without notice to Inland, removed these charges from their billing statements, hiding their error.

During the time period in question, an Ordinance Establishing A Municipal Utility Tax Within The Village Of Franklin Park No. 8990 G 12 (1989) was in effect. The ordinance permitted ComEd to impose a Municipal Tax upon those customers of electricity ". . . within the corporate limits of the Village of Franklin Park . . .". (Ordinance attached hereto as Exhibit A). ComEd was authorized to impose such taxes pursuant to 220 ILCS 5/9-221. Because Inland was not located within the incorporated limits of the Village of Franklin Park, ComEd was not authorized to collect such Municipal Taxes from Inland. Therefore, any collection of these taxes was improper and in contravention to existing statutes and ordinances.

Notably, ComEd's Motion to Dismiss does not address the merits of Inland's claim, adopting Inland's factual allegations as true. ComEd does not dispute the fact that the imposition of Municipal Taxes and Franchise Costs upon a business located outside the incorporated area of the village is not permitted by statute.

Upon learning that ComEd had wrongfully imposed charges for a Municipal Tax and Franchise Costs, Inland promptly filed an Informal Complaint on September 15, 1999 seeking a refund for these improper charges. Due to ComEd's inaction and denial of culpability, Inland

was forced to file a Formal Complaint on May 26, 2000, which it subsequently amended on June 23, 2000 to correct a typographical error.

ARGUMENT

I. Inland is entitled to full recovery of all payments for a Municipal Tax and Franchise Costs, plus interest, improperly charged by ComEd.

It is undisputed that Inland is located at 11600 W. Grand Avenue in Leyden Township, outside of the boundaries incorporated by the Village of Franklin Park. It is further undisputed that Inland was and is exempt from paying a Municipal Tax or Franchise cost pursuant to Franklin Park ordinance No. 8990 G 12 (1989). As such, any charges by ComEd for a Municipal Tax or Franchise cost levied against Inland were improper and in violation of several statutes, codes and ordinances. Therefore, Inland is entitled to full recovery of all payments made, plus interest, relating to these improper charges.

Because ComEd's Motion to Dismiss adopts the merits of Inland's claim and only addresses the allegedly applicable statute of limitations governing recovery, Inland will respond to ComEd's motion by discussing the proper codes and statutes governing recovery for this claim.

A. Inland is entitled to a full refund of all payments for improper charges pursuant to Sections 280.75 and 280.76 of the Illinois Administrative Code.

Certain Municipal Taxes are imposed on sellers of electricity, such as ComEd, who are authorized to then pass those taxes on to customers. *See* 220 ILCS 5/9-221; ComEd Rider 23. The Village of Franklin established the collection of such taxes in Ordinance No. 8990 G 12 (1989); but only for businesses located within its area of incorporation. Therefore, where a utility passed such taxes through to a customer located outside of the incorporated area, the

utility has violated both the municipal ordinance as well as the statute authorizing the pass through of those taxes.

The Illinois Commerce Commission has provided a mechanism for the refund of all such charging errors pursuant to 83 Ill. Adm. Code 280.75. Section 280.75, "REFUNDS", states:

> "a) In the event that a customer pays a bill as submitted by the utility and the billing is later found to be incorrect due to an error either in charging more than the published rate, in measuring the quantity or volume of service provided, or in charging for the incorrect class of service, the utility shall refund the overcharge with interest from the date of overpayment by the customer.
>
> b) The interest rate shall be the rate as established by the Commission to be paid on deposits in Section 280.70(e)(1) of this part.
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> c) The refund shall be accomplished by the Commission either by a credit on a subsequent bill for service or by a check if the account is final or if so requested by the customer."
>
> 83 Ill. Adm. Code 280.75 (Attached hereto as Exhibit B).

In this case, ComEd charged for the incorrect class of service because it classified Inland as being within the municipal boundaries of the Village of Franklin Park, which it clearly was not. As a consequence, Inland was improperly charged a Municipal Tax and a Franchise cost. As provided above, Inland is entitled to a full refund without limitation.

In addition, 83 Ill. Adm. Code 280.76 provides for refunds of incorrectly calculated charges pursuant to Section 9-221 or Section 9-222 of the Public Utilities Act. Section 280.76, "REFUNDS OF ADDITIONAL CHARGES", states:

> "In the event that the Commission orders a public utility to refund incorrectly calculated additional charges made pursuant to Section 9-221 or Section 9-222 of the Public Utilities Act, the public utility shall pay interest on such refund and the rate established by the Commission to be paid on deposits in 83 Ill.Adm. Code 280.70(e)(1)."
>
> 83 Ill. Adm. Code 280.76 (Attached hereto as Exhibit B).

Section 280.76 directly addresses Section 9-221 where a public utility incorrectly levied additional charges upon a customer such as Inland. It is clear from the evidence presented that ComEd wrongfully imposed Municipal Taxes and Franchise Costs for the period 12/5/89 though 10/30/97 in violation of both the ordinance and statue governing the collection of such taxes. In such instances, the above administrative code mandates that the utility must refund all over-charged amounts, with interest and without limitation of time.

Therefore, where a customer has established that it was improperly charged by a utility, the utility must fully refund all amounts relating to such charges plus interest as determined by the Commission. In this claim, in is undisputed that Inland was improperly charged a Municipal Tax and Franchise cost by ComEd when Inland was clearly exempt from such charges. ComEd, by unilaterally removing these improper charges from Inland's billing statement on 10/30/97, admitted that such charges were improper and in violation of the legislative scheme. As such, Inland is entitled to a full refund for payments made on these charges from the period 12/5/89 though 10/30/97.

B. Inland is entitled to a full refund of all payments for improper charges pursuant to 220 ILCS 5/9-252 and 220 ILCS 5/9-252.1.

ComEd, admits in their motion, that Section 5/9-252 and Section 5/9-252.1 apply to Inland's claim for the refund of all payments made regarding the Municipal Tax and Franchise cost. Section 220 ILCS 5/9-252 of the Public Utilities Act, which applies to actions for recovery of excessive or unjustly discriminatory amounts charged for its commodity, product or service, applies to Inland's claim and allows for full reparation without limitation. Section 5/9-252 states:

> When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefore, with interest at the legal rate from date of payment of such excessive or unjustly discriminatory amount.

220 ILCS 5/9-252 (Attached hereto as Exhibit C).

ComEd's collection of Municipal Taxes and Franchise Costs was both excessive and unjustly discriminatory. First, ComEd's collection of a Municipal Tax and a Franchise cost from Inland was excessive because such taxes only apply to businesses situated in incorporated areas. Collection of erroneous fees from a business situated in an unincorporated area result in an excessive amount being charged for the utility's service.

Secondly, ComEd's collection of a Municipal Tax and a Franchise cost from Inland was unjustly discriminatory because other businesses located in unincorporated Leyden Township were not subjected to such taxes. Norkol, Inc., a manufacturing facility, located at 11650 W. Grand Ave., Leyden Township, is situated directly north from Inland. Upon information and belief, no charges for a Municipal Tax or a Franchise cost were levied on this facility. In contrast, on information and belief, Norkol's corporate offices located across the street at 1240 and 1250 Garnet Drive, Northlake, Illinois, which were situated within the incorporated limits of Northlake, were properly charged a Municipal Tax and Franchise cost. ComEd therefore has shown that it knew that businesses located in unincorporated areas were not subject to a Municipal Tax or Franchise cost; and further that they were able to make such distinctions. It is clear that Inland was singled out from other similarly situated businesses in unincorporated Leyden Township, which is discriminatory on its face. Therefore, Section 5/9-252 applies to this action.

Similarly, 220 ILCS 5/9-252.1 of the Public Utilities Act also applies to this action. Section 5/9-252.1 states that:

> When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error in either charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest from the date of overpayment at the legal rate or the rate prescribed by rule of the Commission. . . . Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing.

220 ILCS 5/9-252.1 (Attached as Exhibit D).

Clearly, ComEd incorrectly charged Inland for erroneous taxes due to an error in the billing process, which did not recognize Inland as being located in an unincorporated area. It is undisputed that Inland was located in an unincorporated area, which makes it exempt from paying a Municipal Tax and a Franchise cost. As such, Inland is entitled to a full refund of payments made regarding these erroneous charges, without limitation.

Both the Administrative Code of the Illinois Commerce Commission and the Public Utilities Act are symmetrical in that they both address actions where a utility has erroneously charged a customer and they both prescribe full refund without limitation. As ComEd does not dispute that charging Inland a Municipal Tax and a Franchise cost were improper, it can not possibly ignore the application of the regulations governing their refund.

II. 735 ILCS 5/13-224 Does Not Apply To This Action.

Respondent incorrectly identifies Illinois Code of Civil Procedure 735 ILCS 5/13-224 as the applicable statute of limitation period pertaining to this action. This statute only applies to ". . . charges imposed pursuant to Section 9-201 or 9-202 of the Public Utilities Act that were illegally or unconstitutionally collected . . ." (735 ILCS 5/13-224, Attached hereto as Exhibit E).

Inland does not allege ComEd violated either Section 9-201 or Section 9-202 of the Public Utilities Act. Section 9-201 refers to charges for electricity figured upon ComEd's approved rates or tariffs and how changes in their rate schedules are to be publicized. (Attached hereto as Exhibit F). Section 9-202 refers only to remedies by the Illinois Commerce Commission when they find that ComEd's net income is excessive or when proposed rates are questioned. (Attached hereto as Exhibit G). Neither of these two sections applies to this claim.

Secondly, ComEd attempts to invoke this statue by arguing that 735 ILCS 5/13-224 actually relates to Sections 9-221 and 9-222. In a lengthy footnote in their motion, ComEd argues that the Section 5/13-224's reference to Sections 9-201 and 9-202 ". . .may be a typographical error. . .". (See Respondent's Motion to Dismiss, p. 4, footnote 2). This assertion is nonsense. It is well held in Illinois that statutes are construed and interpreted by their plain meaning. The Court in Toys "R" Us sums up the relevant Illinois law, holding: "Regardless of the court's opinion regarding the desirability of the results surrounding the operation of the statute, the court must construe the statute as it is and may not, under the guise of construction, supply omissions, remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise change the law so at to depart from the plain meaning of the language employed in the statute." Toys "R" Us, Inc. v. Adelman, 215 Ill.App.3d 561, 568, 574 N.E.2d 1328 (1991). ComEd incorrectly asserts that the statute may contain typographical errors and therefore it may apply to this claim. We believe the language contained in 720 ILCS 5/13-224 is unambiguous and that there is nothing to suggest its application to any other unlisted sections. Notably, the references in this statute have remained unchanged by the Illinois legislature for the

past fifteen (15) years. As such, the Commission should reject ComEd's argument that this statue applies to this action.

Even if one were to accept ComEd's argument, that 735 ILCS 5/13-224 applies to Sections 9-221 and 9-222 which clearly are not referenced, this statue still would not apply to this claim. Inland's complaint does not allege that ComEd's collection of a Municipal Tax or a Franchise cost was illegal or unconstitutional. The Complaint only alleges that the collection of the tax was improper. Respondent's characterizations of Inland's allegations are false and misleading. They are attempting to shoehorn Inland's complaint into a statute, which may limit their damages, by restating the allegations of Inland's complaint as something that they clearly are not.

In Illinois, "illegal" collection of taxes has been determined by the courts to be taxes, which have been wrongfully computed in contravention of statutory scheme or legislative authority.[1] Similarly, "unconstitutional" collection of taxes would apply to those taxes, which violate the Illinois Constitution. In such instances, the defending party is typically the State or other municipality. This differs from the case at hand. The subject taxes of this complaint, pursuant to 220 ILCS 5/9-221; ComEd Rider 23, have not been determined to be illegal or unconstitutional, nor are we making such a challenge. Moreover, Inland is not challenging the ability of the municipality to charge such a tax pursuant the Franklin Park Village Ordinance No. 8990 G 12 (1989). Our claim is based on the fact that Inland's property lies outside the

[1] See People ex rel. Hartigan v. Illinois Commerce Commission, 117 Ill.2d 120, 510 N.E.2d 865 (1987) affirming circuit's holding that the annual rate increase was illegal because the Commission had applied an incorrect standard in determining which costs were reasonable and therefore includable in the new rate base; A. Finkl & Sons Co. v. Illinois Commerce Commission, 250 Ill.App.3d 317, 620 N.E.2d 1141 (1st Dist., 1993) holding that Rider 22 was illegal because it did not utilize a test year in determining DSM costs; *see also* Shortino v. Illinois Bell Telephone Co., 207 Ill.App.3d 52, 565 N.E.2d 170 (1st Dist., 1990) holding that Municipal Utility Tax was illegal because it was discriminatory by shifting pay phone users' tax burden onto monthly billed customers in violation of the Public Utility Act. (See attached case law as Exhibit I).

boundaries of the municipality and is thus exempt from the Municipal Tax and the Franchise Costs.

Contrary to Respondent's assertions, 735 ILCS 5/13-224 is not even applicable to this matter. Inland's complaint does not fall within the statute's scope. Inland's complaint neither addresses Sections 9-201 or 9-202 of the Public Utilities Act, nor the "illegality" or the "unconstitutionality" of either the Municipal Tax or the Franchise cost. Respondent's attempt to cloak itself with a more desirable statute of limitations, disregards the allegations of Inland's complaint as well as the applicable codes and statutes on the subject matter.

III. Equity supports the refund of all Taxes and Costs wrongfully charged.

ComEd attempts to persuade this Commission that 735 ILCS 5/13-224 applies based upon principles of equity. Not only is respondent's argument incorrect as stated above, but also principles of equity clearly favor Inland in this case.

ComEd argues that Section 5/13-224 should apply to this action because it has roughly the same period of limitation, three years, as the Franklin Park Ordinance No. 8990 G 12 (1989). In support of their argument they contend that they would be unfairly penalized if Inland is permitted to recover its entire claim, asserting that ComEd would only be able to recover Municipal Taxes back from the Village no more than three years after the due date of such taxes. ComEd suggests they were prejudiced because Inland allegedly delayed in presenting its claim, essentially arguing a theory of laches.

On the contrary, ComEd has unduly prejudiced Inland by continuing to charge a Municipal Tax and Franchise Cost, which it knew, was improper. ComEd admitted its mistake on the very first bill on 12/5/89 because it correctly designated the service address of Inland as "11600 W. Grand Ave., Leyden Township". (See billing attached hereto as Exhibit H). Since

ComEd knew these charges were improper, as evidenced by their omission on Norkol, Inc.'s billing statements, it was in the best position to notice the mistake and protect itself by rectifying this improper billing immediately. Notably, each of the subsequent ninety-four (94) monthly billing statements also contained this admission as they each correctly identified Inland as being located in Leyden Township. Furthermore, ComEd again admitted the charges were improper when it unilaterally removed such charges on 10/30/97 without notification to Inland. By removing such charges without notifying Inland, Inland was left to determine ComEd's mistake without benefit of ComEd's knowledge.

ComEd knew or should have known of their mistake within the first three years of improperly charging Inland since they possessed all the information necessary to make such a determination. ComEd is in a superior position to discover and remedy improper billings. Had they correctly identified the mistake, they would not be in this position. Instead, ComEd acted with complete disregard and continued to charge Inland for taxes they knew were improper. For ComEd to now argue that it has been prejudiced, is against the manifest weight of the evidence and against public policy. A utility can not continuously overcharge a customer for a prolonged period of time and then hide behind an inapplicable statute depriving the customer of working capital and profits, which were rightfully theirs. Therefore, equities should weigh in favor of Inland and not ComEd. This mistake was ComEd's and therefore any penalties resulting therefrom rightfully rests on their shoulders. ComEd's possibility of being barred from recovering more than three years of tax from the municipality does not justify application of an inapplicable statute. ComEd is working backwards in an effort protect itself and shift the costs of its own wrongdoing to a third party.

Conclusion

WHEREFORE, for the forgoing reasons, Complainant Inland Paperboard and Packaging, Inc. f/k/a Inland Container Corp. respectfully requests that the Illinois Commerce Commission deny Respondent's Motion to Dismiss the Amended Complaint. Complainant further requests that the Illinois Commerce Commission find in favor of Inland and award all damages, including the award of interest, prayed for in its Amended Formal Complaint.

Respectfully submitted,

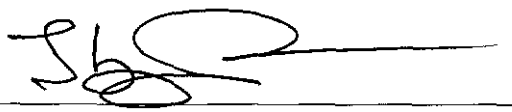
INLAND PAPERBOARD AND PACKAGING, INC.
f/k/a INLAND CONTAINER CORP.

By: 
One of its attorneys

Thomas J. Pontikis
David C. Hartwell
WILLIAMS, MONTGOMERY & JOHN LTD.
20 North Wacker Drive
Suite 2100
Chicago, Illinois 60606
312-443-3200

CERTIFICATE OF SERVICE

I, Thomas J. Pontikis, an attorney, hereby certify that on August 29, 2000, I caused a copy of the attached Response to Commonwealth Edison Company's Motion to Dismiss to be served via U.P.S. overnight mail on Hearing Examiner Philip A. Casey and on Commonwealth Edison at these parties' respective addresses on the attached Service List.



Thomas J. Pontikis

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Attorneys for Commonwealth Edison
Williams J. McKenna, Jr.
Jill C. Dennor
Hopkins & Sutter
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600
(312) 5586538 fax

Hearing Examiner Philip A. Casey
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601